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GARY D. MAYNARD, WARDEN, et al.,
Petitioners,

v.

WILLIAM THOMAS CARTWRIGHT
Respondent.

[redacted]

[redacted]

[redacted]

BRIEF OF RESPONDENT

[redacted]

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COUNTER STATEMENT OF QUESTION PRESENTED

Whether the Court of Appeals for the Tenth Circuit erred in holding that Oklahoma's interpretation and application of its "especially heinous, atrocious or cruel" aggravating circumstance in this case violated the constitutional requirement of *Godfrey* v. *Georgia*.

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COUNTER STATEMENT OF CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment VIII:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

United States Constitution, Amendment XIV:

> No State shall . . . deprive any person of life . . . without due process of law . . . .

COUNTER STATEMENT OF CASE

A. Guilt-Innocence Proceeding

Mr. Cartwright was employed by Hugh and Charma Riddle in their construction business in 1981 and 1982. T 381-82. In December, 1981, Mr. Cartwright injured his leg on the job. T 409. He was fired in January, 1982, after he and Mr. Riddle had a disagreement over the payment of medical bills for treatment of his work-related injury. T 477-78.

Mr. Cartwright had been a good friend and valued employee of the Riddles. T 405, 475, 478. However, when Mr. Riddle fired him, he felt betrayed and apparently suffered considerable emotional distress. T 101, 124-25. This was the only conflict between Mr. Cartwright and the Riddles prior to the homicide. T 405, 478. After Mr. Cartwright was fired, he moved to Nevada. He returned to Muskogee, Oklahoma on May 1. T 481-82.

On May 4, 1982, Mr. Cartwright walked to the Riddles' home to talk with Mr. Riddle about his claim for medical benefits. T 487-488. The prosecution theorized that the Riddles were not home when Mr. Cartwright arrived and that he either waited for them or returned later in the evening. T 601.

The shooting occurred when Charma Riddle unexpectedly discovered Mr. Cartwright in the hall with a shotgun belonging to her husband. According to her testimony, she grabbed the gun, "pushed it aside and it went off." T. 391, 411. She fell, and Mr. Cartwright shot her again. T. 412. Mr. Cartwright then went into the living room and shot Mr. Riddle. T. 391. Mr. Riddle died instantly. T. 311. Thereafter, Mr. Cartwright and Mrs. Riddle struggled, and he stabbed her with a knife. T. 394.

Two days after the crime, Mr. Cartwright voluntarily turned himself in to the authorities. T. 229. At that time, he was emotionally distraught, shaking, and had difficulty talking. T. 253, 254, 440. He could not remember many of the events preceding and following the offense. T. 487-90.

The shooting of Mr. and Mrs. Riddle was strikingly inconsistent with Mr. Cartwright's previous history. He had no prior criminal record of any kind. T. 468-71. And he had no history of violent or assaultive behavior. According to the testimony of relatives and previous employers, Mr. Cartwright had always been a good and dependable employee, had not shown any tendency toward violence, and had usually avoided disputes. T. 430-67.

Mr. Cartwright was convicted of first degree murder for the death of Mr. Riddle.[1]

B. Sentencing Proceeding

The court conducted a separate sentencing hearing to determine Mr. Cartwright's punishment for the murder.[2]

[1] At the same trial, Mr. Cartwright was convicted of shooting with intent to kill and sentenced to seventy five years in the penitentiary for the shooting of Charma Riddle.

[2] In seeking the death sentence, the prosecution relied upon three

statutory aggravating circumstances under Oklahoma's capital sentencing statute: (1) the defendant created a great risk of danger to more than one person, (2) the murder was especially heinous, atrocious, or cruel, and (3) there was a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society. J.A. 6, 7. *See* Okla. Stat. tit. 21 §§ 701.12(2), 701.12(4), 701.12(7), (1981).

The evidence introduced at the first stage was incorporated into the sentencing stage.

In accordance with Oklahoma law, the court instructed the jury that if it did not find one or more statutory aggravating circumstances beyond a reasonable doubt, it was prohibited from considering the death penalty. J.A. 12. The jury was instructed that "[a]ggravating circumstances are those which increase the guilt or enormity of the offense," J.A. 11, and that "unless [it] unanimously f[ound] that any such aggravating circumstance or circumstances outweigh[ed] the finding of one or more mitigating circumstances, the death sentence [could] not be imposed." J.A. 12-13.

With regard to the aggravating circumstances "the murder was especially heinous, atrocious, or cruel," the following instruction was given:

> As used in these Instructions, the term "heinous" means extremely wicked or shockingly evil; "atrocious" means outrageously wicked and vile; "cruel" means pitiless, or designed to inflict a high degree of pain, utter indifference to, or enjoyment of, the sufferings of others.

J.A. 12.

The jury found that the murder was especially heinous, atrocious or cruel and that Mr. Cartwright created a great risk of danger to more than one person. It thereupon

sentenced him to death. The jury rejected the prosecutor's claim that Mr. Cartwright was a continuing threat to society. J.A. 18-19.

C. Oklahoma Court of Criminal Appeals' Decision

On appeal, Mr. Cartwright challenged the constitutionality of Oklahoma's "especially heinous" aggravating circumstance under *Godfrey* v. *Georgia*, 446 U.S. 420 (1980) because the Oklahoma Court of Criminal Appeals had not adopted a limiting construction of the provision. In addition, Mr. Cartwright challenged the application of the circumstance in his case. R. Vol. VIII, Appellant's Brief, 43-48. Rejecting Mr. Cartwright's claims, the Court of Criminal Appeals distinguished Oklahoma's "especially heinous" aggravating circumstance from Georgia's similar statutory provision because Oklahoma's statute is written in the disjunctive. J.A. 29. The court held that it was proper "to gauge whether the murder was heinous, atrocious, *or* cruel in light of the circumstances attendant to the murder." J.A. 30 (emphasis supplied). The court summarized all of those circumstances and found that they "adequately supported the jury's finding." J.A. 31.

D. *En Banc* Opinion of the Tenth Circuit Court of Appeals

The Tenth Circuit, in a unanimous *en banc* opinion, reversed the United States District Court's denial of Mr. Cartwright's petition for a writ of habeas corpus as to his death sentence. *Cartwright* v. *Maynard*, 822 F.2d 1477 (10th Cir. 1987); J.A. 35.

The question, as framed by the Tenth Circuit, was whether Oklahoma "has met the constitutional challenge of defining circumstances and terms that deter arbitrary and unpredictable sentencing decisions and provide adequate justification for imposing the death penalty . . . ," and "whether the application of Oklahoma's 'especially heinous, atrocious, or cruel' aggravating circumstance satisfied the requirements of the Constitution in this case." J.A. 49.

The state argued that "the terms 'heinous,' 'atrocious,' and 'cruel,' coupled with their definitions, direct the attention of the sentencer to the manner of killing and the attitude of the killer." J.A. 64-65. The Tenth Circuit rejected this argument, in part, "for the same reason that the conclusory statement that the offense was 'outrageously wicked and vile, horrible and inhuman' was inadequate in *Godfrey:* 'There is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence.' 446 U.S. at 428." J.A. 63. It observed that the Oklahoma court has said only that "the attitude of the killer, the manner of the killing, the suffering of the victim, and all of the circumstances of the offense are *relevant considerations* in determining whether [to uphold a jury's finding that] a murder was 'especially heinous, atrocious, or cruel.'" J.A. 65 (emphasis supplied). Oklahoma has never articulated any standard that explains which manners of killing, which attitudes of the killer, or which circumstances attendant to a murder distinguish those murders in which death may be imposed from those in which it may not. J.A. 65-69.

The Tenth Circuit held that Oklahoma's interpretation and application of "especially heinous, atrocious, or cruel" accordingly failed to meet the requirements of *Godfrey:* the state had not adopted a construction of the provision which narrowed the class of murders to which it applied and "had failed to apply a constitutionally required narrowing construction in this case." J.A. 69. The Tenth

Circuit did not undertake to prescribe for Oklahoma "what narrowing construction of the 'especially heinous, atrocious, or cruel' aggravating circumstance would satisfy the constitutional requirements," leaving that decision to the state "in the first instance as it construes its own laws in light of constitutional requirements." J.A. 70-71.

E. Subsequent Developments in Oklahoma Law

In *Stouffer* v. *State*, 742 P.2d 562, 563 (Okla.Cr. 1987) (on rehearing), the Oklahoma Court of Criminal Appeals noted the Tenth Circuit's *en banc* decision in Mr. Cartwright's case and adopted a narrowing construction of the "especially heinous, atrocious, or cruel" aggravating circumstance that limits its application "to those murders in which torture or serious physical abuse is present." *Id.* Stouffer's jury found three statutory aggravating circumstances, including the "especially heinous" circumstance. Applying the narrowing construction in *Stouffer*, the court held that "the evidence . . . [did] not support a finding . . . that the murder was especially heinous, atrocious, or cruel." *Id.* at 563-64. Nevertheless, considering the remaining aggravating circumstances and other evidence, the court determined that the jury's finding of the "especially heinous" circumstance was harmless error and affirmed the death sentence.[3]

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[3] At no stage of the present case did Oklahoma ever argue that the jury's consideration of the "especially heinous" circumstance was harmless error or that it had no effect on the jury's weighing process or its decision to impose a death sentence on Mr. Cartwright. In fact, in argument in opposition to an application for a stay of execution in *Coleman* v. *Saffle*, No. 87-2011 (10th Cir. July 20, 1987), the state distinguished *Cartwright* from *Coleman* by pointing out that it "didn't even argue harmless error in Cartwright because the circumstances of the crime were too much like the Godfrey decision, plus the lack of aggravating circumstances other than great risks [sic] of death to more than one person." Tr. of Oral Argument, p. 33. Oklahoma did argue below that a valid aggravating circumstance is *per se* sufficient to uphold a death sentence based in part on a constitutionally invalid aggravating circumstance. But this Court specifically limited the grant of *certiorari* to exclude that issue.

SUMMARY OF ARGUMENT

If a state authorizes capital punishment "it has a constitutional responsibility [under the Eighth Amendment] to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty." *Godfrey* v. *Georgia*, 446 U.S. at 428. At a minimum, "a capital sentencing scheme must 'genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.'" *Lowenfield* v. *Phelps*, ___ U.S. ___, 108 S.Ct. 546, 554 (1988) (quoting *Zant* v. *Stephens*, 462 U.S. 862, 877 (1983)). If a statutory scheme utilizes aggravating circumstances as a means to "genuinely narrow" the death-eligible class, the state must apply them "according to an objective legislative definition." *Lowenfield*, 108 S.Ct. at 554. The Tenth Circuit faithfully followed these settled principles in holding that the writ must be granted in Mr. Cartwright's case, because "the Oklahoma Court of Criminal Appeals failed to apply a constitutionally required narrowing construction of 'especially heinous, atrocious, or cruel' in this case." J.A. 69.

Oklahoma, like most states, relies upon findings of specified aggravating circumstances to narrow the class of persons eligible for the death penalty. An Oklahoma jury must find that one or more statutory aggravating circumstances has been established, and that the statutory

aggravating circumstances are not outweighed by mitigating circumstances, before it may impose a sentence of death. Okla. Stat. tit. 21, § 701.11 (1981).

One of the statutory aggravating circumstances which can form the basis for death eligibility is: "The murder was especially heinous, atrocious or cruel." Okla. Stat. tit. 21, § 701.12(4). At the time of Mr. Cartwright's trial and appeal, the Oklahoma Court of Criminal Appeals had not limited the meaning of this aggravating circumstance except by listing synonyms for each of the three disjunctive, pejorative terms of the statute. The terms and their synonyms can plausibly be applied to any murder and thus do not limit the jury's discretion to impose the death sentence, nor do they provide a principled basis for reviewing a jury's decision.

In Mr. Cartwright's case, the instructions to the jury concerning the "especially heinous, atrocious or cruel" circumstance provided no limiting definitions or principles that could be used to "differentiate this case in an objective, evenhanded, and substantively rational way from the many . . . murder cases in which the death penalty may not be imposed." *Zant*, 462 U.S. at 879.

Similarly, on direct appeal the Oklahoma Court of Criminal Appeals sustained the jury's finding of this circumstance without articulating any limiting standard or limited set of facts which supported—or was necessary to support—the finding. Instead, the court recited the terms "heinous," "atrocious," and "cruel" in the disjunctive, J.A. 30, and relied upon a compendious, unanalyzed summary of the "circumstances attendant to the murder," J.A. 30, to sustain the jury's finding of the circumstance. Such a broad and undefined interpretation of the "especially heinous" circumstance imposes no limits

on the imposition of the death sentence. As the Tenth Circuit aptly observed, "[t]he discretion of a sentencer who can rely upon all of the circumstances of a murder is as complete and as unbridled as the discretion afforded the jury in *Furman*." J.A. 68.

Oklahoma contends that the Tenth Circuit erred in finding anything wrong with a process such as this. It argues repeatedly that there is no "principled way" to distinguish degrees of heinousness in murders and that any attempt to do so—by requiring, for example, that the application of the "especially heinous, atrocious, or cruel" circumstance be limited to those homicides in which the victim has been tortured or has suffered serious physical abuse before death—will impermissibly encroach upon the sentencer's necessarily subjective exercise of discretion. While purporting to acknowledge that the Eighth Amendment function of aggravating circumstances is to guide the sentencer's discretion and genuinely narrow the class of persons eligible for a death sentence, Oklahoma argues that these purposes can be accomplished by (1) instructing the jury baldly to consider whether a particular murder was "especially heinous, atrocious or cruel," and (2) having a state appellate court review the sufficiency of the evidence by reference to all the circumstances of the case, including the "attitude" of the killer, the suffering of the victim, and the manner of the killing.

The most striking thing about this submission is that *Godfrey* forecloses it completely. The state does not even try to argue that the meaning of Oklahoma's "especially heinous, atrocious, or cruel" aggravating circumstance has been narrowed by judicial construction as required by *Godfrey*. In its entire voluminous brief—half devoted to an issue which this Court excluded from argument by limiting the grant of *certiorari*—only two decisions of the

Oklahoma Court of Criminal Appeals apart from Cartwright's are cited—neither for its bearing upon the Oklahoma state-law definition of "especially heinous, atrocious, or cruel." Thus, the state has abandoned (necessarily as we will show) the contention that *Godfrey* was incorrectly applied by the Tenth Circuit; it is reduced to contending that *Godfrey* should simply not be followed; and although this is the inescapable conclusion of its arguments, it neither asks the Court to overrule *Godfrey* nor suggests any reason why *Godfrey* should be overruled. No intelligible basis for reversal being offered, the judgment below must necessarily be affirmed.

ARGUMENT

I.

THE EIGHTH AMENDMENT REQUIREMENT THAT THE STATES NARROW THE CLASS OF PERSONS ELIGIBLE FOR THE DEATH SENTENCE ON THE BASIS OF CLEAR AND OBJECTIVE STANDARDS APPLIES TO OKLAHOMA'S USE OF THE "ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL" CIRCUMSTANCE.

A. The Constitutionally Necessary Narrowing Function of Aggravating Circumstances

Since *Furman* v. *Georgia*, 408 U.S. 238 (1972), one of the two foundation pieces of Eighth Amendment death-penalty jurisprudence has been the requirement that the sentencer's discretion be "suitably directed and limited." As the oft-quoted passage from *Gregg* v. *Georgia*, 428 U.S. 153, 189 (1976), explained it,

> [W]here discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.

In the nearly two decades since *Furman*, the virtually universal vehicle through which the capital sentencer's discretion has been suitably directed and limited is the statutory aggravating circumstance. Whether statutory aggravating circumstances are required to be found in the guilt-innocence phase of the trial, *see Jurek* v. *Texas*, 428 U.S. 262 (1976); *Lowenfield* v. *Phelps*, ___ U.S. ___, 108 S.Ct. 546 (1988), or at the penalty phase of the trial, these circumstances "circumscribe the class of persons eligible for the death penalty," *Zant*, 462 U.S. at 878, by focusing the sentencer's attention upon "the factors about the crime and the defendant that the State, representing organized society, deems particularly relevant to the sentencing decision." *Gregg*, 428 U.S. at 192. Through aggravating circumstances, "the types of murders for which the death penalty may be imposed become more narrowly defined and limited to those which are particularly serious or for which the death penalty is peculiarly appropriate . . . ." *Id.* at 222 (White, J., concurring).

To accomplish this "constitutionally necessary narrowing function," *Pulley* v. *Harris*, 465 U.S. 37, 50 (1984),

> [E]ach statutory aggravating circumstance must satisfy a constitutional standard derived from *Furman* itself. For a system 'could have standards so vague that they would fail adequately to channel the decision patterns of juries with the result that a pattern of arbitrary and capricious sentencing like that found unconstitutional in *Furman* could occur.' . . . To avoid this constitutional flaw, an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.

Zant, 462 U.S. at 876-77 (citation and footnote omitted).

A state cannot satisfy the narrowing requirements of the Eighth Amendment by merely providing the sentencer "relevant information under fair procedural rules," *Gregg*, 428 U.S. at 192, especially if the sentence is imposed by a jury. Most jurors have no experience in sentencing, particularly in murder cases. *Id.* Without clear standards to guide their consideration of a multitude of factors, juries will be unable to determine which factors about the crime and the individual defendant are generally present in all murders and which factors provide a rational basis for imposing death in one case but not in others. *Id.* Also, without clearly defined standards that limit discretion, it is far more likely that individual decisions will be based upon prejudice and caprice or other impermissible considerations. *See Gregg*, 428 U.S. at 197 ("while some jury discretion still exists, 'the discretion to be exercised is controlled by clear and objective standards so as to produce non-discriminatory application. . .'").

To "genuinely narrow" the class of persons eligible for the death penalty, statutory aggravating circumstances must, "in short, provide a 'meaningful basis for distinguishing the few cases in which [the penalty] is imposed from the many cases in which it is not,'" *Godfrey*, 446 U.S. 420, 427-428 (1980) (quoting *Gregg*, 428 U.S. at 188), by referring to objective, readily identifiable facts whose presence or absence can be determined by rational sentencers. "[C]apital sentencing decisions must not be made on mere whim, but instead on clear and objective standards . . . ." *California* v. *Brown*, ___ U.S. ___, 107 S.Ct. 837, 841 (1987) (O'Connor, J. concurring). Each statutory aggravating circumstance must, accordingly, incorporate "an objective legislative definition." *Lowenfield*, 108 S.Ct. at 554. Only through such clearly defined standards can statutory aggravating circumstances perform the critical sorting function mandated by the Eighth Amendment: "adequately diffentiat[ing] [a death-eligible] case in an objective, evenhanded, and substantively rational way from the many . . . murder cases in which the death penalty may not be imposed." *Zant*, 462 U.S. at 879.

When deciding whether a particular death penalty scheme meets Eighth Amendment requirements, the Court "[h]as not stopped at the face of [the] statute, but [has] probed the application of the statutes to particular cases." *McCleskey* v. *Georgia*, ___ U.S. ___, 107 S.Ct. 1756, 1773 (1987) (discussing *Godfrey*). In doing so, the Court has explained more fully the constitutional prerequisites for statutory aggravating circumstances. These prerequisites were fatal to Georgia's application of its "outrageously or wantonly vile" aggravating circumstance in *Godfrey* and are similarly fatal to Oklahoma's application of its "especially heinous" aggravating circumstance, as the Tenth Circuit *en banc* unanimously found.

B. For An "Especially Heinous" Type of Aggravating Circumstance to Perform A Narrowing Function, It Must Be Construed to Apply Only To An Objectively Defined, Limited Class of Murders

Prior to the grant of certiorari in the present case, the Court has had only one occasion to determine whether a particular state's construction and application of the "especially heinous" type of aggravating circumstance provided sufficiently "clear and objective" guidance to perform a genuine narrowing function. In 1980, in *Godfrey* v. *Georgia*, 446 U.S. 420 (1980), the Court specifically addressed this question with respect to Georgia's "(b)(7)" circumstance—whether the murder was "outrageously or

wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery of the victim." 446 U.S. at 423. Since this Georgia circumstance is the virtual equivalent of Oklahoma's "heinousness" circumstance, the Court's treatment of it is material to the analysis of Mr. Cartwright's case. Indeed, because of the striking legal and factual similarities between Mr. Cartwright's case and Mr. Godfrey's case, *Godfrey* provides the analytical blueprint for Mr. Cartwright's case.

Robert Godfrey was charged with and convicted of two counts of murder for the deaths of his wife and mother-in-law and one count of aggravated assault for the beating of his young daughter. 446 U.S. at 424-26. Following a heated telephone conversation with his wife, Godfrey went to his mother-in-law's home, taking a shotgun with him. Through the window, he saw his wife, his mother-in-law and his 11-year-old daughter playing cards. He pointed the shotgun at his wife, and shot her in the forehead, killing her instantly. As he entered his mother-in-law's trailer, he struck and injured his young daughter with the barrel of the shotgun. He then pointed the gun at his mother-in-law and shot her in the forehead, killing her instantly. When he was arrested, he told police officers "I've done a hideous crime, . . . but I have been thinking about it for eight years . . . [and] I'd do it again." 446 U.S. at 425-426.

Godfrey's jury was instructed in the statutory language of the (b)(7) circumstance. 446 U.S. at 426. Death sentences were imposed on both counts of murder, and the jury specifically found that "the offense of murder was outrageously or wantonly vile, horrible and inhuman," omitting the last clause of the statutory language. 446 U.S. at 426. The Georgia Supreme Court affirmed the

sentence, "based upon no more than a finding that the offense was 'outrageously or wantonly vile, horrible and inhuman.'" 446 U.S. at 428.

In discussing the application of Georgia's (b)(7) circumstance to the facts in *Godfrey*, the Court emphasized the state's responsibility to "define the crimes for which death may be the sentence in a way that obviates 'standardless [sentencing] discretion.'" 446 U.S. at 428. In order to constitutionally impose the death penalty, the Court explained, as it had before and as it has since, that a state "must channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death.'" *Id.* When the process of imposing Godfrey's death sentence was analyzed in light of these principles, the Court found the process woefully inadequate.

In the first place, the instructions to the jury placed no limits upon the application of the (b)(7) circumstance to the facts of Godfrey's case. The instructions simply recited the terms of (b)(7) without attempting to explain them. The Court found

> nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible and inhuman.' Such a view may, in fact, have been one to which the members of the jury in this case subscribed. If so, their preconceptions were not dispelled by the trial judge's sentencing instructions. These gave the jury no guidance concerning the meaning of any of § (b)(7)'s terms.

446 U.S. at 428-29.

Moreover, the Court found that "[t]he standardless and unchanneled imposition of death sentences in the uncontrolled discretion of a basically uninstructed jury in this case was in no way cured by the affirmance of those sentences by the Georgia Supreme Court," 446 U.S. at 429, for in the process the Georgia court abandoned its rule which had previously limited the application of the circumstance. The Court found that prior decisions of the Georgia court had construed the latter portion of (b)(7)—"in that it involved torture, depravity of mind, or an aggravated battery to the victim"—in such a way as to identify clear and objective limiting standards related to the manner of killing, since those decisions had held that "torture," "depravity of mind" and "aggravated battery" were to be interpreted "in pari materia" and were not to be applied in the disjunctive. 446 U.S. at 430-431.

While the Court in *Godfrey* was concerned with the lack of inherent restraint in the language of the first portion of the aggravating circumstance—"outrageously or wantonly vile, horrible and inhuman"—it was similarly concerned in *Gregg* about the language in the latter portion, noting that "depravity of mind or an aggravated battery" could be used to describe any murder. 428 U.S. at 201. If these words were considered in the disjunctive and separated from a requirement that the homicide involve torture, they would also fail to constrain the sentencer's discretion. The Georgia court's early decisions had satisfied both of these concerns by interpreting "depravity of mind" as the mental state that "led the murderer to torture or to commit an aggravated battery before killing his victim," *Godfrey*, 446 U.S. at 431, and requiring evidence of torture or an aggravated battery to the victim to support a finding of "outrageously or wantonly vile, horrible or inhuman."[4]

In Godfrey's case, however, the Georgia court abandoned these limiting principles and approved an application of (b)(7) that would permit its use in any case where a jury subjectively felt that the offense was "outrageously or wantonly vile, horrible and inhuman." By failing to require that Godfrey's murders involve the objectively ascertainable facts of "torture, or an aggravated battery to the victim," the Georgia court disregarded the only meaningful restrictions it had previously placed on the (b)(7) circumstance. For these reasons, Godfrey's death sentence could not stand. As the Court later characterized its decision in *Godfrey*, "the Court struck down an aggravating circumstance that failed to narrow the class of persons eligible for the death penalty." *Zant*, 462 U.S. at 878. *See California* v. *Ramos*, 463 U.S. 992, 1000 (1983) (citing *Godfrey* as an example of a death sentence that was reversed because it rested on "unconstitutionally broad and vague construction of an aggravating circumstance");

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[4] While Justice White, joined by Justice Rehnquist, dissented from the judgment in *Godfrey*, Justice White was in agreement that the limiting principles established by the Georgia court's prior decisions were necessary if the (b)(7) circumstance was to perform a narrowing function. As he explained,

> In one excursus on the provision's language, the court in effect held that the section is to be read as a whole, construing 'depravity of mind,' 'torture,' and 'aggravated battery' to flesh out the meaning of 'vile,' 'horrible,' and 'inhuman.' . . . I see no constitutional error resulting from this understanding of the provision. Indeed, the Georgia Supreme Court has expressly rejected an analysis that would apply the provision disjunctively, . . . an analysis that, if adopted, would arguably be assailable on constitutional grounds.

446 U.S. at 454.

and *McCleskey*, 107 S.Ct. at 1773 (citing *Godfrey* as an example of the invalidation of Georgia's interpretation of an aggravating circumstance that was "so broad that it may have vitiated the role of the aggravating circumstance in guiding the sentencing jury's discretion"). *Compare Proffitt* v. *Florida*, 428 U.S. 242, 255-256 (1976) (emphasizing that the Florida Supreme Court had explicitly adopted and thereafter had consistently adhered to a limiting construction of Florida's "especially heinous" aggravating circumstance).

C. Oklahoma Utilizes the "Especially Heinous, Atrocious or Cruel" Circumstance to Narrow the Class of Persons Eligible For The Death Penalty

The Eighth Amendment's requirement that aggravating circumstances provide objective, rational criteria for "suitably direct[ing] and limit[ing]" sentencing discretion is focused upon the sentencer's "threshold" determination of the defendant's death-eligibility.

As the Court explained in *Zant* and *Barclay* v. *Florida*, 463 U.S. 939 (1983), the process of determining the sentence in a capital trial involves two stages: (1) the threshold or "categorical narrowing" determination of whether the defendant is within the class of murderers eligible for the death penalty and (2) the individualized determination of whether death is the appropriate penalty for the particular defendant. *Zant*, 462 U.S. at 874-79; *Barclay*, 463 U.S. at 954; *id.* at 962-64 (Stevens, J., joined by Powell J., concurring). The threshold determination requires objectively defined and limited aggravating circumstances. At the threshold stage, "the State must establish rational criteria that narrow the decisionmaker's judgment as to whether the circumstances of a particular defendant's case meet the threshold." *McCleskey*, 107

S.Ct. at 1774. *See also Lowenfield*, 108 S.Ct. at 554 (by finding one or more statutory aggravating circumstances at the threshold stage, "the jury narrows the class of persons eligible for the death penalty according to an objective legislative definition").

Oklahoma utilizes its statutory aggravating circumstances, including the "especially heinous, atrocious or cruel circumstance," to define the threshold of death eligibility. In this regard, its death-sentencing process is similar to both Georgia's and Florida's.

Under Oklahoma law, any person convicted of murder in the first degree is punishable by death or imprisonment for life. Okla. Stat. tit. 21, § 701.9A (1981). First degree murder includes all intentional unlawful homicides and all homicides, regardless of intent, committed during the course of enumerated felonies. Okla. Stat. tit. 21, § 701.7 (1981).[5] *See* Brief of Petitioners at 4 (setting forth the text of the statute).

If a person is convicted of first degree murder, punishment is determined by the jury at a separate sentencing hearing. Okla. Stat. tit. 21, §§ 701.10-701.12. *See* Brief of Petitioners at 5-8. Oklahoma's death-penalty statute narrows the class of persons subject to the death penalty by requiring the jury to find that one or more of eight enumerated aggravating circumstances exists—including the circumstance that "the murder was especially heinous, atrocious, or cruel," § 701.12(4)—and that the statutory aggravating circumstances are not outweighed by any mitigating circumstance. § 701.11. J.A. 12-13.

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[5] Unlike Louisiana and Texas, Oklahoma does not build its statutory aggravating circumstances into its definition of capital murder. *Cf. Lowenfield*, 108 S. Ct. at 554-555.

Oklahoma law does not specify the factors to be considered as mitigating circumstances.[6] It limits the jury's consideration of aggravating circumstances to those enumerated in the statute, but it does not provide any standards for weighing aggravating against mitigating circumstances. *Chaney* v. *State*, 612 P.2d 269, 279 (Okla.Cr. 1980); *Brogie* v. *State*, 695 P.2d 538, 543-544 (Okla.Cr. 1985). In returning a death verdict, the jury must specify the aggravating circumstances found, but it is not required to specify anything regarding mitigating circumstances. J.A. 13.

Clearly, the only feature of the statutory scheme which operates to narrow the categories of murder eligible for the death penalty is the definitions of the enumerated aggravating circumstances. Since the jury's finding and weighing of the "especially heinous, atrocious or cruel" statutory aggravating circumstance enters into the threshold determination of death-eligibility in Oklahoma in any case in which it is at issue, it follows that the "especially heinous" aggravating circumstance must be objectively defined and limited in its application in order to perform this "constitutionally necessary narrowing function," *Pulley*, 465 U.S. at 50. The question before the Court is whether Oklahoma interpreted and applied the "especially heinous" aggravating circumstance in Mr. Cartwright's case in such a way as to meet the controlling Eighth Amendment command.

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[6] The instruction given in Mr. Cartwright's case defined mitigating circumstances as "those which, in fairness and mercy, may be considered as extenuating or reducing the degree of moral culpability or blame. The determination of what are mitigating circumstances is for you as jurors to resolve under the facts and circumstances of this case." J.A. 12.

The court below found that it did not. Oklahoma argues here tnat it did, but without analyzing or even citing the pertinent decisions of the Oklahoma Court of Criminal Appeals that define the reach of the "especially heinous" aggravating circumstance. This omission is surprising only until the actual Oklahoma caselaw is examined. For, as the following discussion demonstrates, that caselaw leaves no doubt at all that the Tenth Circuit was correct when it concluded, "there is no constitutionally adequate narrowing construction [of especially heinous, atrocious, or cruel] adopted by the Oklahoma courts . . . ." J.A. 70.

II.

IN CONCLUDING THAT THE OKLAHOMA COURTS IN MR. CARTWRIGHT'S CASE FAILED TO GUIDE THE SENTENCER'S DISCRETION BY CONSTITUTIONALLY ADEQUATE STANDARDS, THE TENTH CIRCUIT FAITHFULLY APPLIED THE EIGHTH AMENDMENT'S NARROWING REQUIREMENT TO REACH A RESULT THAT FOLLOWS *A FORTIORI* FROM *GODFREY*.

The Tenth Circuit correctly recognized that *Godfrey* controls this case. The two cases are indistinguishable except that Oklahoma law defining its "especially heinous" circumstance was less suited to serve a genuine narrowing function in Mr. Cartwright's case than was Georgia law in Mr. Godfrey's. Here, as in *Godfrey*, the victim died instantly from a gunshot wound.[7] Here, as in *Godfrey*, Oklahoma had once interpreted its "especially

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[7] Indeed the sequence of events was not materially different in either case, except that Godfrey killed two persons and Mr. Cartwright killed one. Godfrey shot and killed one victim with a shotgun, by shooting her through the window of her trailer. He then entered the trailer and struck and injured his daughter with the barrel of the shotgun. Thereafter, he pointed the gun at the second homicide victim and shot her in the forehead, killing her instantly.

heinous" factor as requiring evidence of physical abuse or torture—an objective standard which the Court recognized in both *Godfrey* (446 U.S. at 429-432) and *Proffitt* v. *Florida* (428 U.S. at 255-256) has the potential to serve as an appropriate principle in narrowing the application of this aggravating circumstance. But here, as in *Godfrey*, the sentencing jury was not instructed that, in order to find that the murder was especially heinous, atrocious or cruel, it must first find that the victim was tortured or physically abused. Rather, it was directed to make a wholly subjective judgment—based on nothing more than its own emotional response to the crime spread before it—as to whether the murder was "especially heinous, atrocious or cruel." And finally, as in *Godfrey*, the Oklahoma appellate court "in no way cured" "[t]he standardless and unchannelled imposition of [the] death sentence[] in the uncontrolled discretion of a basically uninstructed jury," 446 U.S. at 429. To the contrary, the Court of Criminal Appeals on Mr. Cartwright's appeal eschewed any narrowing construction of the limitless statutory language and sanctioned the imposition of the death sentence simply by upholding the jury's "especially heinous" finding in consideration of all of "the circumstances attendant to the murder." J.A. 30.

In view of these extraordinary parallels to *Godfrey*, the Tenth Circuit could properly have decided, without additional analysis, that *Godfrey* controls. It did not do that. Instead, it bent over backwards, searching all of the Court of Criminal Appeals' decisions to see whether any of its expressed rationales for applying the "especially heinous" circumstance provided a principled basis for finding the circumstance in Mr. Cartwright's case consistent with the use of the circumstance to perform a genuine narrowing function. Only after this painstaking analysis

did the court conclude that "the Oklahoma Court of Criminal Appeals failed to apply a constitutionally required narrowing construction of 'especially heinous, atrocious, or cruel' in this case." J.A. 69. Oklahoma has presented no substantial argument—nor can it—that the Tenth Circuit's analysis of either state law or the Eighth Amendment principles applicable to it is in any way or detail incorrect.

A. The Tenth Circuit's Search For An Objective Standard Limiting the Application of "Especially Heinous, Atrocious, or Cruel"

The Tenth Circuit began its analysis with an explanation of the narrowing function of an aggravating circumstance. Its explanation demonstrates an accurate understanding of, and faithful adherence to, the principles that the Court has articulated consistently from *Gregg* to *Lowenfield*:

> The narrowing function of an aggravating circumstance demands that such a factor be capable of objective determination. Thus, aggravating circumstances must be described in terms that are commonly understood, interpreted and applied. To truly provide guidance to a sentencer who must distinguish between murders, an aggravating circumstance must direct the sentencer's attention to a particular aspect of a killing that justifies the death penalty.

J.A. 53.

Recognizing this Court's previously-expressed concern that the "especially heinous" circumstance could arguably be found in every murder unless its application is limited by some kind of objective standard, J.A. 55-57, the Tenth Circuit assiduously examined the Oklahoma Court of Criminal Appeals' decisions prior to *Cartwright* to deter-

mine whether the Oklahoma court had articulated and adhered to an objective standard limiting the application of the circumstance. J.A. 57-61. Because this was a crucial step in the Tenth Circuit's analysis and will be similarly critical for this Court's analysis, the pre-*Cartwright* Oklahoma decisions must be described in some detail.

In the first case calling for an appellate construction of the "especially heinous, atrocious or cruel" circumstance, *Eddings* v. *State*, 616 P.2d 1159 (Okla.Cr. 1980), *reversed on other grounds*, 455 U.S. 104 (1982), the Oklahoma Court of Criminal Appeals appeared to adopt in its entirety Florida's interpretation of that circumstance. The opinion recites the language of *State* v. *Dixon*, 283 So.2d 1 (Fla. 1973), with unqualified approval:

> [W]e feel that the meaning of such terms is a matter of common knowledge, so that an ordinary man would not have to guess at what was intended. It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies—*the conscienceless or pitiless crime which is unnecessarily torturous to the victim.*

616 P.2d at 1167-1168 (emphasis supplied).

In *Eddings*, however, despite the opinion's endorsement of the *Dixon* construction of the "especially heinous" circumstance, the court upheld a finding that the shooting death of a highway patrolman was "especially heinous, atrocious or cruel" based solely upon the occupation of the victim (peace officer), the fact that he was not expecting

danger, and the use of a shotgun. *Id.* at 1168. *See also Cartwright* v. *State*, 695 P.2d 548, 554 (1985) (characterizing the factual basis for the holding in *Eddings*).[8] J.A. 30.

Two months after its decision in *Eddings*, the Oklahoma court considered a jury's finding of the "especially heinous" circumstance in *Chaney* v. *State*, 612 P.2d 269 (Okla.Cr. 1980). The jury instructions had included the *Eddings/Dixon* definitions without the "unnecessarily torturous" limitation. On appeal, Chaney argued that the terms and their definitions could be applied to any murder. The court upheld the jury's findings and the sufficiency of the instructions, noting that "the manner of death in one case may certainly be distinguishable from another in the degree of atrocity or cruelty." 612 P.2d at 279.

Three months later the Oklahoma court considered this aggravating circumstance in a case involving a kidnapping/robbery murder. *Irvin* v. *State*, 617 P.2d 588 (Okla.Cr. 1980) (modified on other grounds). The victim had been kidnapped, robbed and bound before being shot five times and dumped in an abandoned field. The trial court instructed the jury regarding the definitions of the terms "heinous," "atrocious" and "cruel" quoted in *Eddings*, but refused a requested instruction that the aggravating circumstance was "directed only at the con-

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[8] The trial judge in *Eddings* had "found . . . that the crime was 'heinous, atrocious, and cruel' because 'designed to inflict a high degree of pain . . . in utter indifference to the rights of Patrolman Crabtree.'" *Eddings* v. *Oklahoma*, 455 U.S. 104, 108 n.3 (1982). Justice Powell was led to observe:

> [W]e doubt that the trial judge's understanding and application of this aggravating circumstance conformed to that degree of certainty required by our decision in *Godfrey* v. *Georgia*.

Id. at 109 n.4.

scienceless or pitiless crime which is unnecessarily tortious [sic] to the victim." The Court of Criminal Appeals upheld the trial court's refusal, commenting that "this additional statement added nothing to the definition of the terms previously defined." 617 P.2d at 599.

The decisions in *Chaney* and *Irvin* thus indicated that while the court considered the "unnecessarily torturous" language to be an inherent part of its interpretation of the circumstance, the omission of that language from the jury's instructions was not necessarily reversible error. On the basis of these cases alone, one might have concluded that the court was simply finding the absence of the limiting language non-prejudicial to the defendants because the facts supported a finding of the circumstance within the torture limitation of the *Eddings/Dixon* definition. However, such an assumption was belied by subsequent cases.

In the same month that *Irvin* was decided, the Court of Criminal Appeals affirmed a death sentence in a case in which the victim was shot twice in the head with a pistol. *Hays* v. *State*, 617 P.2d 223 (Okla.Cr. 1980). There was no evidence of a struggle or of suffering by the victim. The court nevertheless sustained the finding of "especially heinous, atrocious, or cruel." Holding that the sentence of death was not imposed "under the influence of passion, prejudice or any other arbitrary factor," the court observed: "This is an unusually cruel killing. The victim lived in Muskogee, and his shop was frequented by numerous residents in the area." 617 P.2d at 231. Thus, the status of the victim and the effect of his death on the community become relevant considerations in determining whether a murder is "cruel."

The court next discussed the "especially heinous" aggravating circumstance in *Burrows* v. *State*, 640 P.2d

533 (Okla. Cr. 1982) (modified on other grounds). In *Burrows*, the defendant shot his pregnant wife four times with a pistol as she fled down the hallway. *Id.* at 542. Although the court modified the death sentence to life imprisonment on other grounds, it specifically upheld the jury's finding that the murder was "especially heinous, atrocious, or cruel." The court recited the definition that *Eddings* had quoted from *State* v. *Dixon*, adding emphasis to the language "conscienceless or pitiless crime which is unnecessarily torturous to the victim." It then discussed the *Godfrey* decision and noted that the victims in *Godfrey* were killed instantaneously and that "there was no evidence of mental or physical torture preceding the killings, or any physical or mental suffering whatsoever." The court distinguished *Burrows* from *Godfrey* by pointing out that "[a]lthough [the victim in *Burrows*] did not linger a long while, she did not die immediately; and as she lay there, the life she carried, she knew, would die also." 640 P.2d at 543.

At this point in the history of Oklahoma's construction of the "especially heinous, atrocious, or cruel" circumstance it appeared that suffering by the victim could support the finding of the "especially heinous, atrocious, or cruel" circumstance, but in view of *Hays* and *Eddings*, application of the circumstance was not limited to cases in which the victim suffered. Such an interpretation was indeed approved by the court in later cases. *See Boutwell* v. *State*, 659 P.2d 322 (Okla.Cr. 1983) (modified on other grounds) and *Davis* v. *State*, 665 P.2d 1186 (Okla.Cr. 1983).

Before the next Court of Criminal Appeals decision involving the "especially heinous" circumstance, this Court issued its opinion in *Eddings*, noting its disapproval of the application of the circumstance there. *See* n.

8, *supra*. Soon afterwards, the Oklahoma court heeded this warning and reversed a death sentence based upon the "especially heinous" circumstance. *See Odum* v. *State*, 651 P.2d 703 (Okla.Cr. 1982).[9] The murder victim in *Odum* was collecting an insurance premium from an employee at a local club. Odum attempted to persuade him to play pool for $5.00 a game and he refused. Later in the evening, Odum waited outside for the victim, followed him to a motel, walked up to the vehicle in which he was sitting, raised a gun and shot him in the neck. When Odum returned to his car, his brother asked, "Did you get him?" and Odum answered in the affirmative. Relying upon *Godfrey's* mandate "that the death penalty not be imposed in an arbitrary or capricious manner," the court modified the death sentence to life, because "[t]here was no evidence of any physical or mental suffering whatsoever and the *manner of killing* cannot be said to lie at the 'core' of the statutory aggravating circumstance." 651 P.2d at 707 (emphasis supplied).

The language used by the court in *Odum* and other cases,[10] suggested that the "manner of killing" was a factor in the court's analysis. However, without having explained the rationale by which, or the situations in which, the "manner of killing" could be especially heinous, atrocious, or cruel, the court left open to speculation what "manners of killing" could establish the circumstance. While the "manner of killing" can obviously vary from

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[9] *Odum* v. *State* is the only case in which the Oklahoma Court of Criminal Appeals—prior to the *en banc* Tenth Circuit opinion herein—failed to uphold a jury's finding of "especially heinous, atrocious, or cruel."

[10] See *Chaney* v. *State*, 612 P.2d 269, 280 (Okla.Cr. 1980) ("the manner of death in one case may certainly be distinguishable from another in the degree of atrocity or cruelty").

case to case, the differences frequently show nothing more about the state of mind of the killer or the effect on the victim than is shown in any first degree murder. *See* Brief of Petitioners at 49, 50. The facts that a person shoots someone twice, shoots a friend, shoots a stranger, uses a shotgun instead of a rifle, or shoots a policeman does not provide any principle or standard relating to the manner of killing, suffering of the victim, or mental state of the killer which genuinely narrows the class of persons eligible for the death sentence. Nor does the mere presence of such facts provide a principled basis for appellate review of the sentencing decision. Yet, with the sole exception of *Odum*, the Oklahoma court has sustained the finding of "especially heinous, atrocious, or cruel" in cases which span this entire range, and it has never articulated any standard that explains why these killings were in any fashion worse than the norm.

The brevity of its regard for the teachings of *Godfrey*, as well as its disregard of the limitations implied by the *Dixon* language, is exemplified by its subsequent decisions in *Boutwell* v. *State*, 659 P.2d 322 (Okla.Cr. 1983) and *Davis* v. *State*, 665 P.2d 1186 (Okla.Cr. 1983). In *Boutwell*, the court approved a finding of "especially heinous, atrocious, or cruel" where there was no evidence that the victim was tortured or suffered. In fact, the Oklahoma Court of Criminal Appeals later relied upon *Boutwell*—in Mr. Cartwright's case—to show that "[torture] of the victim is not a necessary [factor]." J.A. 29-30. Boutwell was convicted of a murder which occurred during the robbery of a grocery store. The victim was shot five times. The court upheld the finding of the "especially heinous" circumstance because Boutwell "planned well in advance to take the victim's life . . . and [Boutwell] and the victim knew each other." *Boutwell*, 659 P.2d at 322.

See also J.A. 30 (stating that the murder in *Boutwell* "was 'especially heinous, atrocious, or cruel,' because the defendant, who knew the victim, planned the murder well in advance").

In *Davis* v. *State*, the defendant was convicted of two counts of murder. The killings occurred during a dispute with his estranged wife, her two brothers and their friend at the Davis' apartment. Davis fired six shots, killing two people and wounding two others. The jury found, among other aggravating circumstances, that the murders were "especially heinous, atrocious, or cruel" and imposed the death penalty. On appeal, Davis challenged the evidentiary basis for the jury's finding of this circumstance, specifically pointing to the Florida interpretation inaugurated by *Dixon* which requires a showing of torture or physical or mental suffering to the victim preceding the killing. The court acknowledged that this was the general interpretation of the Florida court, but rejected Davis' contention on the following basis:

> [I]n construing 21 O.S. Supp. 1976 § 701.12(4) we are not [sic] bound only by the limitation that our interpretation not be open-ended. *Gregg* v. *Georgia*, *supra*. Accordingly we find that since appellant perpetrated a mass-murder by inflicting multiple gunshot wounds to his victims, the jury was presented with sufficient evidence from which they could find the acts 'atrocious' as defined in the instructions.

665 P.2d at 1202, 1203.

Davis thus confirms what any fair analysis of the earlier cases shows: that the Oklahoma Court of Criminal Appeals has never utilized Florida's limiting language—"the conscienceless or pitiless crime which is unnecessarily torturous to the victim"—as a limitation at

all. In the words of the Tenth Circuit, "[t]he Oklahoma Court of Criminal Appeals has never held that this language is mandatory . . . ." J.A. 60. Rather, the language refers simply to one kind of offense that can be considered especially heinous, atrocious or cruel. Under the court's definitions and applications of these terms, there can be innumerable others, dependent only upon the court's subjective, case-specific review of the manner of killing, the attitude of the killer, and the circumstances surrounding the killing. *See Stouffer* v. *State*, 742 P.2d 562, 563 (Okla.Cr. 1987), acknowledging that the terms and definitions "could apply to many murders"; *see also* Rosen, *The "Especially Heinous" Aggravating Circumstance in Capital Cases—The Standardless Standard*, 64 N.C.L. Rev. 941, 986 (1986), noting the "remarkably inclusive" application of this circumstance in Oklahoma, often based on "whatever [the Oklahoma court] finds distasteful about a murder." That this was in fact the standard was made even clearer in the cases that followed.

In *Robison* v. *State*, 677 P.2d 1080 (Okla.Cr. 1984), the defendant was convicted of three counts of first degree murder and received three death sentences. The killings took place during the robbery of a house shared by the three victims. The jury found that the murder of one of the victims was "especially heinous, atrocious, or cruel." The court concluded that "[d]eath occurring at close range by two gunshots between the eyes amply supports a finding that death occurred in a heinous, atrocious, or cruel manner." 677 P.2d at 1088.

In *Nuckols* v. *State*, 690 P.2d 463 (Okla.Cr. 1984), there was evidence of a beating which inflicted multiple skull fractures, lacerations, injuries to the brain, several fractured ribs and injury to the genitals. Although the court

rejected Nuckols' argument that there was no evidence of suffering, it went on to say:

> Even if we accepted appellant's claim, *Eddings* and subsequent cases make clear that suffering of the victim is not the major factor we consider regarding this aggravating circumstance. As we noted in *Odum*, the 'manner of killing' is a relevant consideration, as well as the circumstances surrounding the homicide. *Odum*, *supra*; *Stafford* v. *State*, 669 P.2d 285, 299 (Okl.Cr. 1983). We also have examined the killer's attitude to learn if it was especially pitiless or cold. *Boutwell* v. *State*, 659 P.2d 322, 329 (Okl.Cr. 1983) and *Jones* v. *State*, 648 P.2d 1251 (Okl.Cr. 1982). . . .
>
> We find both the circumstances leading up to [sic] and the manner in which the homicide was committed, sufficiently atrocious to be at the 'core' of the circumstance.

690 P.2d at 472, 473.

If the Oklahoma court did at one time intend to adopt a limiting interpretation of this aggravating circumstance, subsequent cases demonstrate that it had either abandoned the limitation or applied it so inconsistently that it no longer provided any genuine narrowing of the class of death-eligible murders long prior to the decision below. The Court of Criminal Appeals had persistently declined to adopt any coherent limiting principle or standard to confine the reach of the "especially heinous" circumstance and had committed itself to the practice of subjectively evaluating all of the episodic facts before it in each case, finding on all but one occasion that some combination of these facts was sufficient to establish that the murders were "especially heinous, atrocious or cruel." It was pursuant to this practice that the Court of Criminal Appeals

reviewed the finding of "especially heinous, atrocious, or cruel" in Mr. Cartwright's case.

B. The Oklahoma Court's Decision In Cartwright And The Tenth Circuit's Analysis of It: Sentencing Discretion Which Can Rely Upon All of the Circumstances of A Murder Is As Complete and As Unbridled As the Discretion Afforded the Jury in *Furman*

The Court of Criminal Appeals dismissed Mr. Cartwright's claim under *Godfrey* by noting that "according to the plurality in *Godfrey*," Georgia had defined its aggravating circumstance to mean that "torture must have been involved in the murder." J.A. 29. In contrast, it explained:

> This Court has not defined the 'especially heinous, atrocious, or cruel' aggravating circumstance in such a manner.

J.A. 29. The court then declared, for the first time, that the provision is to be interpreted in the disjunctive, thereby eliminating any possible limitation which could be gleaned from its previous references to manner of killing, suffering of the victim, or "the conscienceless, pitiless crime which is unnecessarily torturous to the victim." While the court provided examples of its "disjunctive" application of the terms "heinous," "atrocious" or "cruel," it relied solely on the terms themselves and their synonyms to explain its holdings, and it did not provide any hint as to how the terms differed in application:

> The statute is written in disjunctive language, and we have defined 'heinous' as 'extremely wicked or shocking evil'; ['cruel' as] 'pitiless or designed to inflict a high degree of pain, utter indifference to or enjoyment of the suffering of others.' *Eddings* v. *State*, 616 P.2d 1159 (Okl.Cr. 1980) *remanded for*

resentencing, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed. 2d 1 (1982).

> While it is true that torture may be a sufficient factor to justify a finding that the murder was especially heinous, atrocious or cruel (see *Stafford* v. *State*, 665 P.2d 1205 (Okl.Cr. 1983) . . . and *Jones* v. *State* . . .), it is not a necessary one. In *Eddings* v. *State*, . . . this Court held that the fact that the victim was a police officer rendered the crime especially heinous, atrocious or cruel under the above definitions.

J.A. 29-30. The court provided other examples:

> [I]n *Boutwell* v. *State* . . . the murder of a convenience store clerk was 'especially heinous, atrocious, or cruel,' because the defendant, who knew the victim, planned the murder well in advance. In *Davis* v. *State*, . . . the defendant's act of shooting his victim several times was 'atrocious.' In *Jones* . . . the defendant's acts of shooting three persons in a barroom for no apparent reason was 'extremely wicked' and 'shockingly evil.

J.A. 30.

Considering the multitude of situations which may establish the "especially heinous" circumstance, the court announced that it was "proper to gauge whether the murder was heinous, atrocious or cruel in light of the circumstances attendant to the murder." J.A. 30. The court then summarized the prosecution's entire case against Mr. Cartwright, without placing special emphasis on any particular aspect or factor, and held that it "adequately supported the jury's finding." J.A. 31.

When the Tenth Circuit examined the Court of Criminal Appeals' treatment of the "especially heinous" circumstance in Mr. Cartwright's case, it found that

> [t]he construction of 'especially heinous, atrocious, or cruel' employed by the Oklahoma Court of Criminal Appeals in this case is a departure from the construction initially adopted in *Eddings*. The court no longer limits this aggravating circumstance to murders that are 'unnecessarily torturous to the victim,' one of the standards adopted in *Eddings* and previously approved by the Supreme Court in *Proffitt*. The court now relies upon the definitions of the terms 'heinous,' 'atrocious,' and 'cruel,' and upon the manner of the killing, the attitude of the killer, the suffering of the victim, and all of the circumstances surrounding the murder.

J.A. 63. It should be noted that this description of the Oklahoma court's construction of "especially heinous, atrocious or cruel" precisely matches that which Oklahoma now offers this Court as *satisfying* the narrowing requirements of the Eighth Amendment. It is, therefore, important to see how the Tenth Circuit analyzed this construction in light of those requirements.

At the outset, the Tenth Circuit examined the definitions of each of the three terms, "heinous," "atrocious," and "cruel," and, like the Court in *Godfrey*, decided that the definitions themselves were so vague as to still permit their application to any murder.[11] As the court explained,

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[11] These definitions were given at Mr. Cartwright's trial: " 'heinous' means extremely wicked or shockingly evil; 'atrocious' means outrageously wicked and vile; 'cruel' means pitiless, or designed to inflict a high degree of pain, utter indifference to, or enjoyment of, the sufferings of others." J.A. 12.

The Tenth Circuit did note that Oklahoma's definition of "cruel," in focusing on the suffering of the victim and the defendant's attitude toward it, "is somewhat more precise . . ." J.A. 64. There were, however, two reasons why this definition failed to cure the *Godfrey* problem:

> First, the Oklahoma court has clearly rejected the argument that the suffering of the victim is the major factor to be considered under this aggravating circumstance . . . . Second, because

"[v]ague terms do not suddenly become clear when they are defined by reference to other vague terms." J.A. 64. The court then turned to an examination of "the attitude of the killer, the manner of the killing, the suffering of the victim, and all the circumstances of the offense . . . ." J.A. 65.

While noting that the attitude of the killer had in some cases been found "conscienceless" or "pitiless" or "indifferent to the suffering of the victim" and had thus been deemed to support a finding of the circumstance, the Tenth Circuit concluded that the Oklahoma court looked instead to "the manner of the killing, the suffering of the victim, or the circumstances of the offense," and thus, the search for limiting principles had to focus upon these other areas. J.A. 65. As to the manner of killing, the court found that "[t]he cases in which the [Oklahoma] court has found the manner of killing to support this aggravating circumstance do not reveal any pattern or consistency in the way in which the murder was committed." J.A. 66. Indeed, "[t]he court has not identified which manners of killing are *not* 'especially heinous, atrocious, or cruel.'" *Id.* (emphasis in original). As to the suffering of the victim, "the [Oklahoma] court has held that it is not necessary for the victim to have suffered for a murder to satisfy this aggravating circumstance." J.A. 67.

> the Oklahoma court has emphasized that a murder need only be heinous, atrocious, *or* cruel, . . even if the definition of cruel was adequate, the vague definitions of atrocious and heinous would still allow a sentencer to rely upon an unconstitutionally vague standard in determining that a murder satisfies this aggravating circumstance.

J.A. 64 (citations omitted)(emphasis in original). This latter reason—the coupling of vague terms in the disjunctive with potentially objective and limiting terms—was also identified by Justices White and Rehnquist in their *Godfrey* dissent as a construction "that would arguably be assailable on constitutional grounds." 446 U.S. at 454.

At bottom, the Tenth Circuit concluded, "[t]he underlying position of the Oklahoma court appears to be that it can simply review the circumstances of the murder and divine whether the murder was 'especially heinous, atrocious, or cruel.'" J.A. 67 (citing *Cartwright* v. *State*, 695 P.2d at 554). The constitutional shortfall in such a "limiting principle" is that it provides no basis for the confinement of an aggravating circumstance that, by its terms, "could fairly characterize almost every murder," *Godfrey*, 446 U.S. at 428-29. The Tenth Circuit explained,

> "We agree that all of the circumstances surrounding a murder must be examined to determine whether the murder was 'especially heinous, atrocious, or cruel,' but there must be some objective standard that specifies which circumstances support such a determination. Consideration of all the circumstances is permissible; reliance upon all of the circumstances is not. When the sentencer is free to rely upon any particular event that it believes makes a murder 'especially heinous, atrocious, or cruel,' the meaning that the sentencer attached to this provision 'can only be the subject of sheer speculation.' *Godfrey*, 428 U.S. at 429 . . . . The discretion of a sentencer who can rely upon all of the circumstances of a murder is as complete and as unbridled as the discretion afforded the jury in *Furman*. No objective standards limit that discretion."

J.A. 67-68.

Accordingly, the Oklahoma court "failed to apply a constitutionally required narrowing construction of 'especially heinous, atrocious, or cruel' in this case." J.A. 69.

III.

OKLAHOMA'S CRITICISM OF THE TENTH CIRCUIT'S ANALYSIS MISREPRESENTS THAT ANALYSIS AND IGNORES THE COURT OF CRIMINAL APPEALS' SUBSEQUENT ADMISSION THAT ITS CONSTRUCTION OF THE "ESPECIALLY HEINOUS" CIRCUMSTANCE IN *CARTWRIGHT* DID NOT ADEQUATELY NARROW THE CLASS OF DEATH ELIGIBLE CASES.

Oklahoma says that "[t]he opinion of the Tenth Circuit in *Cartwright* can be read to imply that the aggravating circumstance 'especially heinous, atrocious, or cruel' must be limited to those cases where the victim has suffered from physical abuse, and factors such as the attitude of the killer cannot be considered . . . ." Brief of Petitioners, at 37. Plainly, the Tenth Circuit does not say, and its opinion cannot "be read to imply," anything of the sort. What it says—as it must under *Zant*, *Godfrey*, *Gregg*, and *Proffitt*—is that the Oklahoma Court of Criminal Appeals is obliged to give *some* limiting construction to the "especially heinous" aggravating circumstance, and that whatever limiting construction the court adopts must be adhered to when it reviews a sentencer's finding of the circumstance. Further, the Tenth Circuit says—as *Godfrey* squarely holds—that if a state court decides to confine the "especially heinous" circumstance to cases involving torture or physical abuse (as it could properly do under *Proffitt*), it cannot turn this limiting principle on and off at random and approve a finding of the "especially heinous" circumstance where physical abuse is lacking.

Oklahoma further argues that the Tenth Circuit has forbidden the Oklahoma courts to employ a construction of the "especially heinous" circumstance which focuses upon "the attitude of the killer, the manner of the killing, or the suffering of the victim . . . ." Brief of Petitioners, at 36. To the contrary, what the Tenth Circuit actually did

was to explore each of these dimensions—the killer's attitude, the manner of the killing, and the victim's suffering—as the Court of Criminal Appeals has developed each, to see if there was any "objective standard," J.A. 68, within any of these dimensions that imposed any genuine restriction upon the classification of murders as "especially heinous, atrocious or cruel." J.A. 65-67. Only after finding that none of the dimensions imposed any such restriction did the Tenth Circuit hold that the Oklahoma court had failed to adhere to *Godfrey*, according to *Godfrey's* plain terms. In making this determination, the Tenth Circuit left open to the Oklahoma Court of Criminal Appeals the option of avoiding any future *Godfrey* problems by reinstating the "unnecessarily torturous" limiting principle which it originally adopted but then abandoned, or by adopting any other clarifying interpretation of the "especially heinous, atrocious, or cruel" language that the Court of Criminal Appeals might choose, within the wide latitude left by *Godfrey* and undiminished by the *Cartwright* opinion itself. J.A. 70.

In an effort to suggest that the Oklahoma court's construction of "especially heinous, atrocious or cruel" genuinely does ferret out the cases more deserving of death, the state goes to great lengths to isolate particular aspects of Mr. Cartwright's crime which might support an "especially heinous, atrocious or cruel" finding under a proper standard—*e.g.*, "'Hugh doubtless heard the shotgun blasts which tore through Charma's body . . . [and] he quite possibly experienced a moment of terror as he was confronted by [Mr. Cartwright] and realized his impending doom.'" Brief of Petitioners, at 46-47 (quoting from the Court of Criminal Appeals opinion, J.A. 31). Oklahoma argues that since such aspects of the case would satisfy limited constructions of "heinous, atrocious,

or cruel" adopted in other states, Oklahoma's interpretation truly does distinguish murders more deserving of death. *Id.* at 42-48.

All of this is vastly wide of the mark, inasmuch as the Tenth Circuit never purported to decide whether Mr. Cartwright's particular offense could or could not have been characterized as especially heinous, atrocious, or cruel *on the facts*, had the Oklahoma Court of Criminal Appeals chosen to adopt a limiting principle against which to measure those facts. J.A. 70-71. The Tenth Circuit believed—and rightly—that it is altogether irrelevant whether the finding of heinous, atrocious, or cruel in Mr. Cartwright's case could have been made or sustained in other states than Oklahoma. *Godfrey's* rule is obviously not satisfied simply because there is some out-of-state jurisdiction in which an aggravating circumstance finding could be sustained under a properly limited application of the cognate circumstance. *Godfrey*, rather, entitles a condemned person to have the finding of his aggravating circumstances measured against limiting principles that have been adopted and applied with reasonable consistency by the courts in which he has been sentenced and in which his sentence is reviewed. *See Godfrey*, 446 U.S. at 432 n.15 (pointing out that some states make multiple murders an aggravating circumstance, but that Georgia had not).

An even more telling response to Oklahoma's argument was recently provided by the Oklahoma Court of Criminal Appeals itself. After the Tenth Circuit's *en banc* opinion in Mr. Cartwright's case, the Oklahoma court announced its opinion on rehearing in *Stouffer* v. *State*, 742 P.2d 562 (Okl.Cr. 1987). Taking note of the Tenth Circuit *Cartwright* rulings, the court acknowledged that its previous construction of "especially heinous, atrocious, or cruel"

(which relied on the definitions of terms) did not provide "objective guidance . . . and could include many murders," 742 P.2d at 563, in violation of *Godfrey*. *Id.* Therefore, the court adopted an interpretation of the circumstance which "restricts its application to those murders in which torture or serious physical abuse is present." *Id.*

Applying this limiting principle to the facts of *Stouffer*, the court clarified the nature of the "torture or serious physical abuse" with which it was concerned. The original opinion in *Stouffer*, 738 P.2d 1349, 1353 (Okl.Cr. 1987), set forth the circumstances of the homicide as follows:

> Ivens [the victim of Stouffer's shooting with intent to kill] handed Stouffer a loaded .38 caliber gun. Stouffer turned to leave and then turned back around and shot Ivens in the chest and arm. He then walked over to Reaves [the victim of Stouffer's first degree murder] and shot her through her hand she had put to her head as she said, "No." Another shot was fired, but Ivens did not see it. Stouffer then returned to Ivens and shot him in the face. Stouffer left and Ivens crawled to a telephone which he used to call the police.

On rehearing, applying the "torture or serious physical abuse of the victim" limitation, the court held that the "especially heinous, atrocious or cruel" circumstance *was not supported* by these facts, because

> [t]here was no reason to believe that Reaves was conscious after the first shot. She expired within minutes at the scene.

742 P.2d at 564. Even though Reaves clearly knew what was about to happen to her, and—like Hugh Riddle—heard the shots "tear through [Ivens'] body" and "quite possibly experienced a moment of terror as [s]he was

confronted by [Stouffer]" (Brief of Petitioners at 46-47) this did not amount to "torture or serious physical abuse." She suffered neither of these, because she was not conscious after the first shot and she died quickly.[12]

Under the *Stouffer* standard, it is plain that the murder of Hugh Riddle would not support a finding of "especially heinous, atrocious or cruel." For purposes of this standard the circumstances of his murder were identical to the circumstances of the murder of Linda Reaves. Oklahoma's effort to show that the subjective pre-*Cartwright* standard is necessary because of the impossibility of otherwise assessing degrees of heinousness has thus been throughly undermined by the very court which produced that standard. And when the Oklahoma Court of Criminal Appeals adopted what is, in its view, an "objective" standard, the murder of Hugh Riddle could no longer be deemed "especially heinous, atrocious or cruel."

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[12] In cases decided after *Stouffer*, the Oklahoma court has maintained this interpretation of "torture or serious physical abuse." *See Castro* v. *State*, 745 P.2d 394, 408 (Okla.Cr. 1987) (exclusion of evidence that "stab wounds . . . would have caused a tremendous degree of shock and pain" removed the evidentiary support for the "especially heinous" circumstance); *Mann* v. *State*, 59 Okla.B.J. 76, 81 (Okla.Cr. January 5, 1988) (evidence that the victim suffered multiple contusions, cuts, a slit throat, and a broken leg prior to the fatal wound "demonstrated that [he] was undoubtedly subjected to extreme physical abuse, resulting in a great deal of pain and fright for an extended period of time"); *Hale* v. *State*, 59 Okla.B.J. 344, 352 (Okla.Cr. January 29, 1988) (evidence showed that the victim was conscious after being shot five times and suffered for an extended period of time before he died); *Rojem* v. *State*, No. F-85-485, Slip Opinion at 15 (Okla.Cr. March 16, 1988) (injuries from forcible rape and stabbing of seven year old child supported jury's finding).

IV.

OKLAHOMA'S COMPLAINTS ABOUT THE TENTH CIRCUIT'S OPINION ARE NO MORE THAN THINLY VEILED EXPRESSIONS OF DISSATISFACTION WITH THE NARROWING REQUIREMENTS OF THE EIGHTH AMENDMENT.

In Point II(B) of its brief, Oklahoma elaborates upon the theme that affirmance of the Tenth Circuit's opinion will signify an impermissible intrusion into the constitutionally appropriate exercise of sentencing discretion and will preclude the sentencer's subjective assessment of facts that is necessary for an individualized determination of sentence. Brief of Petitioners at 56-78. This argument is misconceived for two reasons. It fails to distinguish between the process of narrowing the class of death-eligible persons and the process of making the ultimate individualized sentencing decision. And it rests on nothing more than disagreement with the fundamental premise of post-*Furman* jurisprudence—the necessity of eliminating the arbitrary and capricious imposition of the death penalty.

Oklahoma's fear that enforcement of the Eighth Amendment narrowing requirement will intrude into the reserve of sentencing discretion required by the Eighth Amendment itself and by a practical penology reflects a failure to distinguish between the narrowing process that determines death-eligibility and the subsequent choice of sentence to be imposed upon a death-eligible individual. The narrowing determination as to whether any particular case is within the class of death-eligible offenses must be made "according to an objective legislative definition," *Lowenfield*, 108 S. Ct. at 554.

If and after this narrowing function has been properly carried out, the sentencer may exercise discretion,

unguided by objective criteria, in choosing between death and a lesser punishment.

> Once the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty, . . . the jury then is free to consider a myriad of factors to determine whether death is the appropriate punishment.

California v. *Ramos*, 463 U.S. at 1008.

But while Oklahoma's expressed concern about the restriction of capital sentencing discretion is thus in part a product of misunderstanding, it is more the expression of a grievance. The state argues repeatedly that it is "impossible . . . to place a different value on different murders in different cases involving different defendants," Brief of Petitioners at 70, and refers to "the unlikelihood of any entity being able to make principled comparisons of different murders and having to say that some are less heinous than others," *id.* at 68, yet it argues vehemently that sentencers ought to be able to decide whether a person should be eligible for death because a murder is "especially heinous, atrocious, or cruel."

Such an obviously self-contradictory plea is in fact a plea to permit subjective, unrestrained feelings of horror and outrage to take the place of rational weighing of objectively-defined facts in the threshold determination of death eligibility. It is a plea in Mr. Cartwright's case to let the jury consider factors such as the youthful age of the victim—the fact that "he was a young man [30 years old] . . . and was cut down in the prime of his life." J.A. 16 (prosecutor's closing argument setting forth facts he believed "ma[d]e this a particularly atrocious and cruel crime"). *See also* J.A. 6 (prosecutor's bill of particulars setting forth the fact "that the deceased was only 30 years of age" in support of the "especially heinous" circumstance). It might be a plea in another case to let the race or class or gender of the victim be considered, for the words "especially heinous, atrocious, or cruel" and their synonyms, "extremely wicked or shockingly evil," "outrageously wicked and vile," evoke powerful feelings—feelings that if left operative will necessarily embody the class, race, gender, and age biases that still permeate the fabric of society.

In essence, Oklahoma's impassioned plea is a plea for the return of pre-*Furman* sentencing processes—for "standards so vague that they would fail adequately to channel the sentencing decision patterns of juries with the result that a pattern of arbitrary and capricious sentencing like that found unconstitutional in *Furman* could occur." *Gregg*, 428 U.S. at 196 n.46. Oklahoma's plea should be understood for what it is and, in keeping with all that this Court has decided in capital cases since 1972, it should be decisively rejected.

V.

THE ISSUE IN PART II OF THE BRIEF OF PETITIONERS IS NOT BEFORE THIS COURT.

We do not reply to Part II of Oklahoma's brief because it addresses an issue which this Court deliberately excluded from argument by its limited grant of *certiorari* in this case. As the Court is well aware, Oklahoma's petition for the writ presented two questions. The Court granted *certiorari* limited to Question 1. *See* order granting *certiorari*, No. 87-519, January 11, 1988. Nevertheless, Part II of Oklahoma's brief is—with only a change of title and a few disingenuous cosmetic brushups—Point II of its *certiorari* petition virtually *verbatim*.

CONCLUSION

The judgment of the United States Court of Appeals for the Tenth Circuit should be affirmed.

Respectfully submitted

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